PP

v.

ZULKEFLE ABU BAKAR & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CRIMINAL TRIAL NO: 45-42-98]
4 JANUARY 2000

CRIMINAL PROCEDURE: *Prosecution - Close of Prosecution - Whether there is a prima facie case to answer - Standard of Proof - Beyond reasonable doubt*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Whether chain of evidence broken - Record of drugs during police custody - Whether drugs tampered with - Non-calling of witness by prosecution - Examination of chemist - Quantity of sample used - Whether trafficking proved - Whether presumptions of possession or trafficking applied*

The defendants were charged with an offence under s. 39B(1)(a) Dangerous Drugs Act 1952. At the end of the prosecution case, the defendants submitted that the prosecution had failed to make out a *prima facie* case against the defendants. The defendants also submitted that there was a gap in the chain of evidence as the prosecution failed to call one particular witness, *ie*, C/Insp Andrew Veno.

Held:

[1] The standard of proof to decide whether a *prima facie* case has been made out is proof beyond reasonable doubt.

[2] The prosecution must prove, at the end of its case, all of the ingredients of the charge.

[3] A *prima facie* case cannot be founded on evidence of a balance of probabilities, even if enough to raise grave curiosity or suspicion. There must be evidence or proof beyond reasonable doubt to convict if the accused does not call evidence raising a reasonable doubt.

[4] Unless there is a specific allegation and some evidence of tampering, the non-calling of a witness may not necessarily create a material break in the chain of evidence.

[5] The prerequisites of s. 37(d) Dangerous Drugs Act 1952 were not met so as to raise the presumption of knowledge of the nature of the drug or the presumption of possession against the defendants.

[Defendants acquitted and discharged.]

Case(s) referred to:
Leong Bon Huat v. PP [1993] 3 CLJ 603 ***(dist)***
Muhammad Hassan v. PP [1998] 2 CLJ 170 ***(refd)***
PP v. Lin Lian Chen [1992] 1 CLJ 2086 ***(refd)***
PP v. Tan Sri Muhammad Muhammad Taib (Criminal Trial No: 45-38-98; High Court, Kuala Lumpur) ***(refd)***
PP v. Teh Eng Wah (45-38-98) ***(refd)***
Ti Chuee Hiang v. PP [1995] 2 MLJ 255 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 179(i), 180(i), (ii), 182A
Dangerous Drugs Act 1952, ss. 2, 37(d), 37(da), 37(h), 39B(1)(a), 39B(2)

For the prosecution - Yaacub Hj Chik DPP
For the 1st accused - Gurbachan Singh; M/s Bachan & Kartar
For the 2nd accused - Kitson Foong; M/s Kitson Foong & Assoc

Reported by Izzaty Izzuddin

JUDGMENT

Abdul Wahab Patail J:

The charge against the accused persons, Zulkefle bin Abu Bakar (OKT1) and Abd. Satar bin Mohd. Kunchu (OKT2), is as follows:

> Bahawa kamu bersama-sama pada 13 Julai 1997, di antara jam 10.30 pagi hingga 1.25 petang, di hadapan Blok H, Apartment Taman Tunku, Taman Tunku, Kuala Lumpur, Wilayah Persekutuan, telah mengedar dadah berbahaya iaitu 97,123.6 gram cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

I reproduce herewith the prosecution case as outlined in the opening statement under s. 179(i) of the Code as follows:

> 1. Berdasarkan maklumat pengedaran dadah, pada 13/7/97 pada jam lebih kurang 10.30 pagi, DSP Abd. Manaf bin Abd. Razak (pengadu) bersama-sama pasukannya semasa membuat tinjauan di kawasan Taman Tunku Apartmen Bukit Tunku, Kuala Lumpur telah nampak satu buah kereta jenis Proton Saga nombor pendaftaran KX 7109 di kawasan letak kereta tempat tersebut. Di dalam kereta tersebut, pengadu

mendapati ada seorang lelaki berkulit gelap (yang kemudiannya dikenali sebagai Abd. Satar bin Mohd. Kunchu iaitu OKT (2)) seorang diri. Pada masa itu juga, pengadu nampak 1 buah kereta jenis Toyota Corolla nombor pendaftaran WCP 4383 telah melalui di hadapannya di mana pemandunya seorang lelaki Melayu bercermin mata cerah seorang diri (yang kemudiannya dikenali sebagai Zulkefle bin Abu Bakar OKT (1)).

2. OKT Zulkefle bin Abu Bakar telah memberhentikan keretanya. OKT Abd. Satar bin Mohd. Kunchu telah keluar dari kereta Proton Saga tersebut dan masuk ke dalam kereta Toyota Corolla tersebut di sebelah pemandu kereta Toyota Corolla itu beredar dari situ.

3. Pengadu mengarahkan ASP Ab. Rahman bin Nawi, C/Insp. Abdul Wahab bin Hj. Yaacob, D/Sjn. 69535 Muslim bin Elias bersama kumpulan masing-masing mengekori kereta Toyota Corolla tersebut. Pengadu dan kumpulan C/Insp. Fisol bin Salleh berada di dalam kawasan tersebut dan membuat pemerhatian ke atas kereta Proton Saga KX 7109 itu.

4. Kereta Toyota Corolla WCP 4383 telah sampai di rumah No. PT 8260, Taman Desa Jasmine, Bandar Baru NiIai, Negeri Sembilan. di mana OKT Abd. Satar bin Mohd. Kunchu dan OKT Zulkefle bin Abu Bakar memasuki rumah tersebut. Kemudiannya OKT Zulkefle bin Abu Bakar berlepas dan rumah tersebut seorang diri dengan menggunakan kereta Toyota Corolla WOP 4383 itu. Beliau telah diekori oleh C/Insp. Ab. Wahab bin Hj. Yaacob dan D/Sjn.69535 Muslim bin Elias.

5. Kereta Toyota Corolla WCP 4383 itu telah menghala ke Kuala Lumpur dan sampai di Kondominium Heritage, Jalan Pahang, Kuala Lumpur di mana OKT Zulkefle bin Abu Bakar mengambil seorang penumpang yang kemudiannya dikenali sebagai Johari bin Abu Bakar. Kereta Toyota Corolla WCP 4383 itu kemudiannya sampai dan berhenti di luar pagar Taman Tunku Apartment, Bukit Tunku, Kuala Lumpur pada jam lebih kurang 1.25 tengah hari 13/7/97. Pengadu nampak OKT Zulkefle bin Abu Bakar keluar dan kereta Toyota Corolla itu dan berjalan menuju ke arah kereta Proton Saga KX 7109. Pada masa yang sama Johari bin Abu Bakar telah keluar dan mengambil-alih memandu kereta Toyota Corolla itu.

6. Pengadu nampak OKT Zulkefle bin Abu Bakar sampai ke kereta Proton Saga KX 7109 membuka pintu bahagian pemandu kereta itu dan masuk, duduk dan tutup pintu kereta Proton Saga itu. Pengadu terus mengarahkan C/Insp. Fisol bin Salleh serta kumpulannya menyerbu dan menahan kereta Proton Saga KX 7109 itu sementara pengadu serta kumpulannya menyerbu dan menahan kereta Toyota Corolla WCP 4383 itu dengan bersuara "POLlS, POLlS" dan mengarahkan Johari bin Abu Bakar keluar. Pemeriksaan ke atas kereta Toyota Corolla itu dibuat oleh pengadu tetapi tidak menjumpai apa-apa barang salah.

7. Sementara itu C/Insp. Fisol bin Salleh serta kumpulannya telah menyerbu kereta Proton Saga KX 7109 dengan cara memblok kereta tersebut dengan kereta yang dipandu oleh beliau sendiri. C/Insp. Fisol bin Salleh telah memperkenalkan diri sebagai polis. OKT Zulkefle bin Abu Bakar yang berada dalam kereta Proton Saga itu berada di dalam keadaan pucat dan ketakutan. OKT Zulkefle bin Abu Bakar dibawa keluar dan kereta tersebut dan C/Insp. Fisol bin Salleh terus merampas kunci kereta yang berada di lubang kunci kereta itu.

8. Selepas itu Johari bin Abu Bakar dibawa ke tempat kereta Proton Saga dan pemeriksaan ke atas kereta Proton Saga KX 7109 telah dibuat oleh C/Insp. Fisol bin Salleh dengan dihadiri oleh OKT Zulkefle bin Abu Bakar dan Johari bin Abu Bakar, pengadu dan anggota polis yang lain. Di dalam "boot" kereta Proton Saga KX 7109, C/Insp. Fisol bin Salleh telah menjumpai (4) guni plastik yang diikat dengan tali rafia di mana setelah diperiksa didapati mengandungi 98 ketulan mampat berbalut plastik disyaki mengandungi dadah jenis ganja. Disamping itu, beliau juga menjumpai 1 ketulan mampat berbalut plastik disyaki mengandungi dadah ganja di dalam boot kereta Proton Saga KX 7109 berhampiran guni-guni itu. Laporan polis kemudiannya dibuat iaitu Sentul Repot 7776/97.

9. Sementara itu Insp. Zainol Hisham bin Abu pada 13.7.97 jam lebih kurang 1.40 tengahari bersama pasukannya telah menangkap OKT Abd. Satar bin Mohd. Kunchu di rumah No. PT 8260, Taman Desa Jasmine, Bandar Baru Nilai, Negeri Sembilan.

10. Barang-barang kes telah diserahkan oleh C/Insp. Fisol bin Salleh kepada pegawai penyiasat ASP Rosdi bin Shariff pada 13/7/98 jam lebih kurang 7.40 petang. Barang kes telah dihantar ke Bahagian Pendaftaran Penjenayah Bukit Aman, Kuala Lumpur untuk pengesanan cap jari pada 1 5/7/97 jam lebih kurang 10.30 pagi dan diterima balik oleh pegawai penyiasat pada 23/7/97 jam lebih kurang 11.45 pagi tetapi hasil pemeriksaan dan perbandingan ialah tiada kesan cap jari ditemui pada barang kes.

11. Barang-barang kes telah dihantar ke Jabatan Kimia Malaysia, Petaling Jaya dan telah disahkan oleh ahli kimia, Encik Chong Yong Kiong sebagai cannabis seberat 97,123.6 gram.

12. Siasatan pegawai penyiasat menunjukkan kereta Proton Saga KX 7109 didaftarkan atas nama Abdul Jabbar bin T.A. Mohd. Kunchu, iaitu adik kepada OKT Abd. Satar bin Mohd. Kunchu. Pendakwaan akan memanggil Encik Saiful Azhar bin Che Saad, pegawai Jabatan Pengangkutan Jalan Wilayah Persekutuan untuk mengesahkan perkara ini melalui dokumen yang dikeluarkan dan komputer Jabatan. Mengikut Jamilah binti T.A. Kunchu (iaitu adik kepada OKT Abd. Satar bin Mohd. Kunchu), OKT Abd. Satar bin Mohd. Kunchu menggunakan

kereta KX 7109 pada waktu pagi 13/7/97 untuk balik ke Kuala Lumpur dari Alor Setar Kedah. Gambar-gambar di dalam kes ini diambil oleh D/L/Kpl.50335 Mohd. Sharif bin Ahmad dan D/L/Kpl.50551 Shaharin bin Ahmad. Percakapan beramaran di bawah seksyen 37A Akta Dadah Berbahaya 1952 telah dirakam oleh Insp. Tansli Mering ke atas OKT Zulkefle bin Abu Bakar dan oleh ASP Azmi Md. Said ke atas OKT Abd. Satar bin Mohd. Kunchu. Siasatan juga menunjukkan harga pasaran cannabis yang dirampas tersebut bagi tahun 1998 ialah sekitar RM110,550.00 hingga RM120,600.00.

13. Elemen-elemen kesalahan yang perlu dibuktikan di dalam pertuduhan di bawah seksyen 39B Akta Dadah Berbahaya 1952 ialah:

    (a) OKT Zulkefle bin Abu Bakar dan OKT Abd. Satar bin Mohd. Kunchu bersama-sama mempunyai milikan ke atas dadah tersebut dan juga mengetahui dadah tersebut adalah dadah berbahaya.

    (b) Dadah yang dirampas adalah dadah berbahaya dan beratnya adalah seperti yang dinyatakan di dalam pertuduhan.

    (c) OKT Zulkefle bin Abu Bakar dan OKT Abd. Satar bin Mohd. Kunchu telah bersama-sama mengedar dadah berbahaya.

14. Bagi elemen pertama, keterangan dan pengadu, C/Insp. Fisol bin Salleh, ASP Ab. Rahman bin Nawi, C/Insp. Abdul Wahab bin Hj. Yaacob, Abdul Jabbar bin T.A. Mohd. Kunchu, Jamilah binti T.A. Kunchu, Saiful Azhar bin Che Saad boleh digunakan untuk membuktikannya.

15. Bagi elemen kedua, pendakwaan akan menggunakan keterangan ahli kimia untuk membuktikannya.

16. Bagi elemen ketiga, keterangan untuk membuktikannya juga adalah melalui keterangan pengadu, C/Insp. Fisol bin Salleh, ASP Ab. Rahman bin Nawi, C/Insp. Abdul Wahab bin Hj. Yaacob, Abdul Jabbar bin T.A. Mohd. Kunchu, Jamilah binti T.A. Kunchu, Saiful Azhar bin Che Saad dan ASP Ahmad Sofi bin Hj. Zakaria.

17. Pihak pendakwaan akan membuktikan transaksi serah menyerah dadah berbahaya berlaku di antara OKT Abd. Satar bin Mohd. Kunchu dengan OKT Zulkefle bin Abu Bakar melalui saksi-saksi polis ini.

18. Rantai keterangan tentang barang kes adalah melalui keterangan C/Insp. Fisol bin Salleh, pegawai penyiasat, C/Insp. Andrew Veno, ahli kimia dan D/Kpl.67013 Nurazlina binti Abdullah.

19. Pihak pendakwaan akan membuktikan melalui keterangan langsung daripada 14 orang saksi bahawa OKT Zulkefle bin Abu Bakar dan OKT Abd. Satar bin Mohd. Kunchu telah bersama-sama mengedar dadah berbahaya seperti di dalam pertuduhan di bawah seksyen 39B Akta Dadah Berbahaya 1952.

At the end of the prosecution case, the defence has submitted that the prosecution has failed to make out a *prima facie* case against the accused persons as required by s. 180(i) of the Criminal Procedure Code (the Code) and that accordingly an order of acquittal ought to be recorded under s. 180(ii) of the Code.

Section 180 as amended and applicable after January 1997 provides as follows:

180 Procedure after conclusion of case for prosecution

(i) when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused.

(ii) If the court finds that the prosecution has not made out a *prima facie* case against the accused, the court shall record an order of acquittal.

(iii) If the court finds that a *prima facie* case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence.

In considering whether the prosecution has made out a *prima facie* case it is necessary to consider the standard of proof required to do so. In this regard I had said in *PP v. Teh Eng Wah* 45-38-98 as follows:

> As required by section 180(i) of the Criminal Procedure Code FMS Cap 6, the court must decide at the close of the prosecution case whether the prosecution has made out a *prima facie* case. What is the standard of proof required to prove a *prima facie* case? What is clear is that there is no definition of the term in the Code, and the term itself provides no indication whether the standard is proof on a balance of probabilities or beyond reasonable doubt. Usage of the term in our case-law has to be resorted to for guidance. The usual meaning ascribed to it is 'on the face of it' or 'at first glance': see *Tan Boon Kean v. PP* [1995] 3 MLJ 514 FC; *Lt. Kol Yusof bin Abdul Rahman v. Kol Anuar bin Md Amin & Anor* [1997] 1 MLJ 562 CA. If one were to quibble perhaps 'primarily on the face of it' is closer to the literal meaning. The '*prima facie* test' is probably best stated by Azmi FCJ in *Munusamy v. PP* [1987] 1 MLJ 492 FC:

> On the assumption that the prosecution evidence was accurate, could the accused be lawfully convicted?

Peh Swee Chin FCJ in *Dalip Bhagwan Singh v. PP* [1998] 1 MLJ 1 FC; [1997] 4 CLJ 645 FC, referring to the above passage said:

> It would not do any violence to the language to say that the word 'accurate' could mean 'true' in the above quotation. It would also not be off the mark to say the words 'prosecution evidence' in the same quotation refer to the evidence of 'primary facts' mentioned by Lord Diplock who held that the prosecution made out a case by adducing such evidence of primary facts in *Haw Tua Tau* (at p 51). Such evidence of primary facts could logically refer to evidence or evidence sufficient enough to prove each ingredient of an offence, such as death as one of the ingredients in a murder case. Once there is sufficiency of such evidence, so long as it is not inherently incredible such as the landing of a flying saucer from outer space on Dataran Merdeka in Kuala Lumpur, a *prima facie* case is made out. In concluding on the sufficiency of such evidence to satisfy the said ingredients, there will be sometimes a lot of rejection of irrelevant or inadmissible evidence.

The test then, is not merely to see if the evidence is not inherently incredible. *Dalip Bhagwan Singh v. PP* requires an evaluation of sufficiency of evidence in respect of all the elements of the charge after rejection of irrelevant and inadmissible evidence. Distinguishing *Haw Tua Tau v. PP* [1981] 2 MLJ 49, and following *Khoo Hi Chiang v. PP* [1994] 1 MLJ 269 and *Arulpragasan a/l Sandaraju v. PP* [1997] 1 MLJ 1 the Court of Appeal in *Lt. Kol Yusof bin Abdul Rahman v. Kol Anuar bin Md A Amin & Anor* [1997] 1 MLJ 562 CA, held that the degree of proof required to establish a *prima facie* case is proof beyond all reasonable doubt. To digress for a moment, such a standard avoids the lacuna where an accused adduces no evidence after the defence has been called. In such a case, if the accused elects to remain silent and calls no evidence, the prosecution's case remains unrebutted and the court has to convict on the very same material.

Indeed the conclusion of the Court of Appeal would accord with the meaning of the term *'prima facie'* as used by Azmi FCJ in *Tan Boon Kean v. PP* [1995] 3 MLJ 514 FC:

> *'Prima facie'*, means on the face of it or at first glance. So, 'a *prima facie* case' is a 'case which is sufficient to call for an answer. While *prima facie* evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, is not conclusive' (see the *Oxford Companion to Law* at p 987). '*Prima facie* evidence' is evidence where 'a party's evidence in support of any issue is so weighty that no reasonable man could help deciding the issue in his favour in the absence of further evidence' (see *Cross on Evidence*

> (2nd Ed) at pp. 24 and 25; and also per Wee Chong Jin CJ in *Gan Soo Swee & Anor v. Ramoo* [1969] 1 MLJ 59 at p. 61). In our view, under s. 180, a *prima facie* case is one which is established by sufficient beyond reasonable doubt evidence and can be overthrown only by rebutting evidence adduced by the other side, so as to cast a reasonable doubt on the prosecution case as to the guilt of the accused.

Given that the Code does not provide a definition of *'prima facie'*, leaving therefore its meaning and the standard of proof required open to interpretation, the accused ought to be given the benefit of an interpretation more favourable to him. That would mean applying the beyond reasonable doubt test.

The effect of the amendments to section 180 and 182A of the Code is essentially therefore to designate the action at the end of the prosecution case as 'determining whether there is a *prima facie* case', and at the conclusion of the trial, where the evidence of both parties has been heard as 'determining whether the prosecution has proved its case beyond reasonable doubt'.

Having said so, I had proceeded further to say:

It is trite that 'beyond reasonable doubt' does not mean 'beyond a shadow of a doubt'. The term was well dealt with in the judgment of Buhagiar J in *Saminathan & Ors v. PP* [1955] 21 MLJ 121, and quoted extensively in *Lt. Kol Yusof bin Abdul Rahman.* What is a reasonable doubt has been admirably explained by Denning J in *Miller v. Minister of Pensions* [1947] 2 All ER 372, 373:

> ... need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

It would not do any violence to the above if the difference between 'fanciful' and 'reasonable' is viewed as whether the evidence is credible, probable, plausible or logical that a reasonable person, having regard to the ordinary course of nature or natural events, human conduct, and in the particular circumstances of the particular case, would accept it as to act upon it as having occurred or been proven to have occurred, or as truthful or accurate; and not any doubt that could, with the application of some ingenuity, be conjured up, envisioned or visualised.

In considering whether a *prima facie* case has been made out for the purpose of s. 180, and applying the standard of 'beyond reasonable doubt' as the standard of proof, there is always the handicap of evaluation of the prosecution evidence without the benefit of hearing the evidence if any from the defence. As alluded to above, it involves the question of what level of credibility is to be attributed to such evidence which is challenged by the defence, but upon which the defence version has not been heard and tested. In *PP v. Tan Sri Muhammad bin Muhammad Taib* 45-28-98, I had dealt with this question as follows:

> Prior to the amendment, the prosecution was required to make out a case which if unrebutted would warrant a conviction. The background has been well summed up by KC Vohrah J in *Mohd Amin b Abdullah v. PP* [1998] 6 MLJ 122. The effect has been to do away with the more rigorous test of credibility applied in *Arulpragasan a/l Sandaraju v. Public Prosecutor* [1997] 1 MLJ 1 FC and to adopt the lower standard of proof at the end of the prosecution case applied in *Haw Tua Tau v. PP* [1981] 2 MLJ 49 PC. Some explanation is merited. It has been said that the approach in *Arulpragasan* calls for a maximum evaluation of the prosecution evidence while the approach in *Haw Tua Tau* calls for a minimal evaluation. To do justice to these two cases, it must be noted that the term was used in *Arulpragasan* in reference to 'applying a more rigorous test of credibility'. The view in *Haw Tua Tau* and adopted in the amended section 180 is to reserve the application of the more rigorous test of credibility to the end of the case; while in the intermediate stage at the end of the prosecution case, the applicable test is whether there is evidence not otherwise incredible in respect of the ingredients of the offence charged. The evidence not otherwise incredible is assumed to be credible, to be reviewed at the end of the trial together with any evidence adduced by the defence. See *Dalip Bhagwan Singh v. PP* [1998] 1 MLJ 1 FC; [1997] 4 CLJ 645 FC.
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> The court, acting under section 180, cannot act capriciously but must consider whether there is evidence not otherwise incredible adduced in respect of the ingredients of the offence. To borrow the words of Peh Swee Chin FCJ in *Dalip Bhagwan Singh*, "In concluding on the sufficiency of such evidence to satisfy the said ingredients, there will be sometimes a lot of rejection of irrelevant or inadmissible evidence." The evaluation at the end of the prosecution case must therefore, as always, be conducted with utmost care and attention as it involves liberty and property of the accused, inasmuch as he has to remain to defend himself, even perhaps under remand, and put to the trouble and expense of further defending himself. Acting judicially, the court cannot however embark on its own critical evaluation of the evidence, but must, unless the point is obvious, primarily deal with the particular issues raised in the submissions of no case to answer.

Applying therefore the standard of proof beyond reasonable doubt to the prosecution evidence, and assuming the prosecution evidence not otherwise incredible as credible for the moment, I proceeded to consider whether the prosecution has proved all of the ingredients of the charge.

Chain Of Evidence Of The Dangerous Drug Recovered

The prosecution called ASP Rosdi bin Shariff (SP1), the investigating officer, who received the exhibits being four gunny sacks marked A, B, C and D, each containing slabs of plant material suspected to be ganja marked A1-A25, B1-B24, C1-C25 and D1-D24; and a slab marked E1, from C/Insp. Fisol bin Salleh (SP3) at about 7.40pm on 13 July 1997. There was a total of 99 slabs in all, wrapped in aluminium foil and clear plastic. He signed a transfer form for the exhibits at that time. The form was tendered as exh. P3. He also received the form for exhibits seized, produced as P4A, P4B and P4C. These exhibits contained marks made by SP3. SP1 made his identification marks upon the exhibits. At about 8pm SP1 directed Det. L/Kpl Shaharin bin Ahmad (SP8) to take photographs of the exhibits. The photographs were produced by SP8 as exhs. P8A-8L. At about 9.15pm he had handed over the exhibits to Kpl. Nurazlina binti Abdullah (SP6). SP6 confirmed receipt of the exhibits and return of the same on 15 July 1997 at about 10.30am to SP1 and his men, Kpl Romli bin Hashim and L/Kpl Ali Ahmad bin PU Aboo. At 10am SP1 had handed over the said exhibits to C/Insp. Andrew Veno to check for fingerprints. On 23 July 1997 at about 11.45am SP1 took back the exhibits, and placed them into five separate boxes for each of the four gunny-sacks and for the single slab. He marked the boxes before taking the boxes and handing over the same to the chemist, Chong Yong Kiong (SP11) the same day at 2.51pm SP11 confirmed receipt and issued acknowledgement of receipt produced as exh. P9.

Counsel has firstly objected in submission that the exhibits were not recorded in any register book when kept in the exhibit store under her charge. Going over the notes of evidence, I find no suggestion was made, either to SP1 or SP6 that the exhibits taken out were other than those handed over to SP6 and placed in the store on 13 July 1997, nor was there any suggestion that the exhibits had been tampered with. The markings on the said exhibits were not challenged.

Secondly, counsel had submitted that the non-calling of C/Insp. Andrew Veno created a gap in the chain of evidence. Similarly, it was not put to SP1 that the exhibits were in any way tampered with, or different from that sent to C/Insp. Andrew Veno. The markings on the said exhibits remain unchallenged.

The term 'chain of evidence' does not mean that each and every witness who saw or touched the exhibits must, without exception, be called. The prosecution has a complete discretion as to the choice of which witnesses are to be called: *Ti Chuee Hiang v. PP* [1995] 2 MLJ 255 SC. What is absolutely essential, however, is that the prosecution, at the minimum calls sufficient witnesses to show that the exhibits analysed by the chemist were the very same exhibits that were seized. The unchallenged markings on the exhibits, and without not only evidence but also assertion that the exhibits had in any way been tampered with, there can be no doubt as to the identity of the exhibits, and that their integrity as exhibits is maintained. That being the case I would reject the objections made in submission on the non-recording of the exhibits when placed in the store. I would also hold that the non-calling of C/Insp. Andrew Veno has not created a material break in the chain of evidence, unless there is specific allegation and some evidence of tampering.

SP3, together with D/Kpl Kang Boon Chai, D/Kpl Badrim b Abd. Majid, D/Kpl Abd. Hamid b Ujang, D/Kpl Khalid b Hassan had been instructed at 1.25pm by SP2 to intercept and stop KX7109 driven by OKT1. Having stopped the engine and taken the key out, he had searched the car. He did not find any matter suspected to be a dangerous drug upon OKT1 and the passenger compartment of the car. In the boot of the car he found the exhibits above referred to, which he later marked as set out above. There were four gunny sacks, containing a total 98 clear plastic and aluminium foil wrapped slabs, and a separate similarly wrapped slab at the bottom of the boot of the car. When he finished doing so, he placed the exhibits back into the boot of the car and closed the boot. He kept the keys with him when he went to search the other car WCP4383 where nothing incriminating was found. He then ordered D/Kpl Khalid b Hassan to drive KX7109 while he sat next, with OKT1 and D/Kpl Kang Boon Chai sitting in the back. They drove to the Sentul police station where he took out the exhibits again, and marked the exhibits with the letters and numbers described earlier above, together with his signature and the date 13 July 1997. He identified the exhibits produced in court by the chemist and from the photographs produced. At about 3.30pm the same day he was instructed by SP2 to bring the exhibits and OKT1 to IPPK Kuala Lumpur, which he did in KX7109 driven again by D/Kpl Khalid b Hassan with D/Kpl Kang Boon Chai guarding OKT1. At IPPK Kuala Lumpur he had brought the exhibits to the 6th floor, where he prepared the search and seizure lists and also weighed the exhibits. Later still, after SP2 lodged a police report, he prepared a handing over form before handing over OKT1 had the exhibits to SP1 at 7.40pm on 13 July 1997.

I am satisfied there was no break in the chain of evidence with regard to the exhibits from the time of its finding in the boot of KX7109 until it was handed over to the chemist SP11 on 23 July 1997. The defence did not challenge SP11 that the exhibits that he conducted his tests on were not the very same exhibits that he received from SP1. I am therefore satisfied that the material upon which the tests were conducted were the very same material found in the boot of KX7109 at 1.25pm on 13 July 1997 in front of the Bukit Tunku Apartments.

The Chemical Analysis

The chemist SP11 gave oral evidence of his analysis and results. He produced a copy of a report prepared by him, which corroborates his evidence before the court. He carried out in respect of each slab weighing of the slab with the wrapping, and after removing the plant material weighed the empty wrapping to obtain the net weight of the plant material. Next he conducted in respect of each slab a visual physical examination of the loosened plant material and found that it comprised of a single type of plant material. Next, in respect of each slab, he conducted examination of the loosened plant material under a microscope. He found the plant material to contain brown globular resins, systolic hair, simple hair and granular hair in the plant material. For these tests he examined 100% of the plant material. Thirdly, in respect of each slab, he carried out the Duquenois-Levine Test on 32 representative samples. The representative samples tested positive for the presence of cannabinoids, the active ingredient of cannabis. Fourthly, he conducted the Thin Layer Chromatography Test. He used again 32 representative samples for this test, and all the samples tested showed the presence of the three major cannabinoids in the resins. He concluded that the four tests taken in totality showed the plant material to be cannabis as defined in the Dangerous Drugs Act 1952. The net weight of cannabis from the 99 slabs totalled 97,123.6 grams. There is nothing in the cross-examination that would suggest that the determination of the net weight or tests carried out by SP11 were in any way defective, in error or departs from the proper testing procedures normally used. The chemist was very positive that all of the plant material were the same type of plant material. It would ordinarily be perverse not to accept the evidence of the chemist in the absence of any contradictory evidence.

Counsel has argued that on the basis of *Leong Bon Huat v. PP* [1993] 3 CLJ 603 SC, that the chemist ought to state precisely how much samples was used, and that the quantity of sample used must be more that 10%, or at least 200 grams. In that case the chemist had conducted a physical examination of 100% of the plant material. Of it Edgar Joseph Jr SCJ had this to say:

> It is true that the Chemist did say that he had conducted a physical examination of the whole of the plant material, by which, we suppose, he meant a visual examination, aided no doubt by a microscope. But while the result of such an examination might well establish, on the balance of probabilities, that the plant material was cannabis within the meaning of s. 2 of the Act it was necessary to take the matter further and establish beyond any reasonable doubt that that was so.

It is necessary to note that the Supreme Court in that case did not purport to lay out any hard and fast rule as to what would be an adequate quantity for samples for the chemical tests to take the matter further:

> This further step would, of necessity have involved, the carrying out of chemical tests on adequate quantities of the plant material. What would be adequate quantities for this purpose would depend on the particular circumstances of each case and we do not consider that any useful purpose would be served by laying down any mathematical formula. Suffice it to say, that in the present case, we were not satisfied that the samples of plant material upon which the Chemist had carried out the chemical tests, were adequate, having regard to the total weight of the plant material, for the reasons stated.

The chemist had explained that after the physical tests he had conducted the Duquenois Levine test. The test has been described as a presumptive test, in the sense that it is indicative and not confirmatory. After that he had conducted the Thin Layer Chromatography test to confirm the presence of three active cannabinoids. On this fact *Leong Bon Huat v. PP* may be distinguished as the following would explain:

> Explaining how he arrived at this conclusion he said this:
>
> > I conduct a visual examination of the content of "EI" and then I took samples of the content of dried plant matter. I examined the samples using chemical methods and also conducted microscopic examination. I took samples from various positions of each layer of the dried plant matter and I examined and analysed such samples individually.
>
> It will be seen that he made no mention of the results of his physical examination; for example, he did not say that the plant material was all of the same type and physical features as that of cannabis, nor did he say what were the results of his microscopic examination. Did he notice any resin in the plant material? If so, in what quantity was it present? Nor did he tell the court as to what were the tests he conducted using chemical methods; for example, did he resort to the Duquenois Levine test and/or the Thin Layer Chromatography test? If so, what were the results of those tests?

I am therefore satisfied with the evidence of the chemist that there was a net total of 97,123.6 grams of a single type of plant material, and that the plant material is cannabis as defined in s. 2 of the Dangerous Drugs Act 1952.

Trafficking

It is trite that to prove a charge of trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) and punishable under s. 39B(2) thereof, it is essential to prove trafficking. Trafficking is defined in s. 2 of the Act:

> "trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug;

In proving trafficking as defined in s. 2, the prosecution may rely upon one or the other (see *Muhammad bin Hassan v. PP* [1998] 2 CLJ 170; [1998] 2 MLJ 273 FC) of the presumptions in either 37(d) in respect of presumptions of possession and knowledge of the nature of the dangerous drug, or s. 37(da) in respect of a presumption of trafficking.

For completeness I had asked the prosecution and defence to deal briefly with s. 2 although it is not submitted upon initially by the prosecution. Trafficking as defined in s. 2, while appearing to be wide in scope, is subject to basic principle of criminal law, that is that there must be *mens rea*, be it in the form of intent or knowledge.

No direct evidence of intent or knowledge is adduced. If there is any such intention or knowledge, it must be inferred from all of the surrounding circumstances. The only evidence for consideration is that of OKT2 leaving the car KX7109 to join OKT1 in WCP4383 at about 10.30am, and WCP4383 returning at about 1.25pm to the same place. OKT1 was seen getting out of WCP4383 and proceeding to KX7109, entering it and starting the engine, at which point he was apprehended. Driving WCP4383 was another person, one Johari bin Abu Bakar, and not OKT2. This other person had joined OKT1 in KX7109 at PT8260 Taman Desa Jasmine, Bandar Baru Nilai and OKT2 had stayed behind there. What can be safely inferred is that there was an hand-over of the keys of the car KX7109 from OKT2 to OKT1 sometime while they were together between 10.25am and 1.25pm that day.

The dangerous drug concerned was at all times in the boot of KX7109. It is not a concealed compartment specially constructed for the purpose and therefore s. 37(h) of the Act cannot apply to presume, until the contrary is proved, that he had knowledge it was so concealed. If so, the owner of KX7109 could have been charged also.

Section 37(d) of the Act merits some consideration. It provides that:

> (d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

The available evidence put before the court is that some time between 10.30am and 1.25pm OKT1 must have received the keys to the car KX7109. It is likely the key was handed to him when he was with OKT2 in the house in Taman Jasmine. Whilst he had custody and control of the keys at that time, it is more difficult to say he had custody and control of KX7109. The police in its wisdom saw fit to intercept and arrest immediately upon OKT1 starting the car. His actual custody and control of the car was too brief in time that without further evidence for example that he was told of the contents in the boot of the car was dangerous drugs, the court has no evidence upon which it could safely say without any reasonable doubt, he had custody and control and presume knowledge of dangerous drugs in the boot, and in particular the nature thereof.

The case against OKT2 appears stronger. He was seen locking and leaving KX7109 and entering WCP4383 at the time driven by OKT1. He was not seen driving KX7109. He was not seen arriving in KX7109.

In *PP v. Lin Lian Chen* [1992] 1 CLJ 2086; [1992] 2 MLJ 561 SC the Supreme Court held that a vehicle in which a drug is carried in does not *ipso facto* fall within the meaning of 'anything whatsoever containing a dangerous drug', and the presumptions of possession and knowledge under s. 37(d) did not arise, and since the drugs were not in a concealed compartment specially constructed for the purpose, equally the presumption under s. 37(h) that the person for the time being in charge of the car knew of the dangerous drug being so concealed, cannot apply.

OKT2 is not the owner of the car, which is also used by other members of his family. The only evidence, and one that is weak is s. 112 Criminal Procedure Code statement by Jamilah bte TA Kunchu, taken down by SP1, that OKT2 had borrowed the car that morning. There is no evidence of him putting anything into the boot of the car or opening it. There is no

evidence upon which it could safely be inferred that OKT2 must have been in custody and control of the dangerous drug in the boot of the car. That being the case, the prerequisites of s. 37(d) is not met so as to raise the presumption of knowledge of the nature of the drug or of possession. Without the element of knowledge of the nature of the dangerous drugs, an accused cannot be said to be, in the words of s. 2 as may be applicable here, of 'keeping, concealing, selling, giving, receiving, storing, transporting, carrying, sending, delivering, procuring, supplying or distributing' any dangerous drug and thereby held to be trafficking. Without the presumption of possession, an accused cannot be convicted even of the lesser offence of possession.

Perhaps in our minds we feel gravely suspicious and feel strongly that OKT1 and OKT2 ought to explain, and therefore feel the accused persons should be called to enter upon their defence. A defence is not called simply for the satisfaction of curiosity to hear the defence version of the story. Suspicion however grave cannot substitute for proof. The defence is called only where the prosecution at the end of its case has established a sufficient case to warrant requiring the defence to enter upon its defence. Since the defence is at liberty whether or not to present any evidence and at the end of the trial the court is obliged under s. 182A of the Criminal Procedure Code to consider all of the evidence again, the court must ask itself, for the purpose of determining whether or not the prosecution has made out a *prima facie* case, the question 'is the evidence as it stands sufficient for a conviction?' Based upon the authorities, it is not. A conviction cannot be based on anything less that proof beyond reasonable doubt. A *prima facie* case, by whatever any other name it is called, cannot therefore be founded on evidence on a balance of probabilities, enough to raise grave curiosity or suspicions, but must be sufficient evidence to convict if the accused does not call evidence raising a reasonable doubt.

The quantity of dangerous drug in this case is not inconsiderable. According to the chemist, it is 97,123.6 grams. In lots of 200 grams, it could result in the death penalty under the presumption in s. 37(da) for 485 persons. This perspective moves me to voice my indignation and disgust that the investigation was not carried out in more detail. The officers concerned could have checked whether the smell of the drugs could be discerned in the passenger compartment of the car so that a person there could not fail to know it is there. The officers, acting on information, could have allowed the 1st accused to proceed to more incriminating circumstances instead of rushing to arrest. Inexcusably, no steps were taken to ensure that all important witnesses from whom statements were taken

are brought to court. There are witnesses who have not attended. There were police officers who did not attend even for the purpose of identification. They should not think they are above the law, choosing whether or not they wish to attend.

Equally regrettably, some officers giving evidence in court did so with an air of disinterest and nonchalance, and as a matter of course, perfunctorily or indifferently apologising when a mistake is pointed out. Is this the kind of evidence the courts are expected to rely upon with confidence as proof beyond reasonable doubt? I do not think these officers are so ignorant. Which leads one to question whether the trial is expected to result in an acquittal, and the release of the accused persons. These are harsh words, moved by the concern that though the quantity of dangerous drugs is so large, the prosecution is taken so lightly by these officers.

In a real sense, the public and justice as a whole is being shortchanged, that in accordance with the law, the accused persons must be acquitted and discharged.

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